

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA**

**DIANA MEY,
CRAIG CUNNINGHAM,
STEWART ABRAMSON, and
JAMES SHELTON,
individually and on behalf of a class of all
persons and entities similarly situated,**

Plaintiffs,

vs.

Case No. 5:17-cv-00179-JPB

**DIRECTV, LLC;
ADAM COX;
AC1 COMMUNICATIONS;
IQ MARKETING 2, CORP., d/b/a PACIFICOM;
MICHAEL ASGHARI;
NAS AIR LOGISTICS;
JOHN MATTHEWS;
BIRJU, LLC;
PIC SIX, LLC;
MYLAN JOHNSON GROUP;
XCITE SATELLITE, LLC;
EXACT ESTIMATING, LLC;
CDS V1, LLC d/b/a COMPLETE DIGITAL SOLUTIONS;
KREATAMOTIVE LLC;
EXPLOSIVE SALES MARKETING GROUP, INC.**

Defendants

AFFIDAVIT OF DAVID ALLEN BRANDON

A. Background

1. My name is David Allen Brandon, I am a director of 0995316 B.C. Ltd. (referenced herein as “Our company”, “Our”, “Us” as well as “We” when not otherwise described as another entity or group of entities).
2. 0995316 B.C. Ltd. is a company incorporated in British Columbia, Canada that provides subscription-based Customer Relationship Management platform (CRM) software and services to call centers across North America and abroad. Our CRM is combined with telecommunications service. The service is paid for by our customers on a monthly basis in exchange for technical support and management of equipment used to provide the CRM and

EXHIBIT B

telecommunications services. All equipment critical to the services we provide is owned and operated by our company.

3. My specific role with our company is to build and maintain our product and technical support. I am integrally involved in every aspect of our product development through-out all stages, including planning, design, testing and development, including all functionality exhibited by the software and equipment that we provide as a service. No functionality exists in equipment used to provide the services that we offer, that I am not intimately aware of.
4. I therefore have personal knowledge of our CRM, and the database architecture that generated the data discussed in this declaration, and, if called to testify, I could and would competently testify to the contents of this declaration.

B. Information Related to Finders

5. In response to a request from a client of ours, Finders Keepers (“Finders Keepers”), our software provided them with Call Detail Records by means of a “Call Log” report:
 - a. The native format of the Call Log report’s records on our servers and in our archiving system, is a “MySQL” database, which is a file format that can not be opened directly through means such as Excel. The Call Log report allows our customers to export call logs from this database, including adding, removing, and renaming fields, filtering the results by the user who entered the call log, or by the call result, the call’s source, duration, or date. The export is then sent to the customer’s computer via a CSV file, which is a file format that can usually be opened and modified in Excel, but is intended for machines to read rather than spreadsheet programs. The native Call detail record files on our servers:

Since this report was built by our customer, we can not attest to the contents, such as the filters or column mappings, nor to the meaning of any column in its record, nor to the completeness of it.

6. There are a number of custom columns that were created by Finders Keepers, who would need to provide the definitions and information about what those columns mean.
7. I’ve also provided through this affidavit and documents identified as “First time sign-in and troubleshooting.pdf”, “XenCALL Agent Handbook.pdf”, and “XenCALL Manager’s Manual.pdf”, information about our dialing system.
8. All three of these .pdf files are the most current documentation that’s in PDF rather than web-accessible formats, and have been the most current documentation that’s in PDF format rather than web-accessible formats, since and including the date that Finders Keepers became a customer of ours.
9. The latest information regarding our software can be found on our website, www.xencall.com/help.

C. Information Regarding Our Software’s Telecommunication Capabilities

10. High level description of the equipment used to initiate, receive and process phone calls present in the Call detail records

1. The primary piece of equipment used to initiate phone calls is called a “PBX/CRM Server”, which is a type of powerful computer not dissimilar in physical characteristics to the computer which any person would use from their home or office. The defining characteristic of this PBX/CRM Server which differentiates it from a computer you may use at your home, is that software exists on it that allows it to process phone calls destined to or originating from call centers, similar to how a local phone company would have equipment (often, very generally called a PBX) with the purpose to process (or to use the technical term, “bridge”) phone calls initiated by or destined to a consumer (including initiated by or destined to a third party business; being initiated by a consumer or third party business, implies that the call is an inbound call to our customers’ phone number, versus destined to, being an implication that the call was initiated by our customer, and is outbound from our network to the destined party).
2. The PBX/CRM server is connected to an internet connection in a data center containing many servers and internet connections. The purpose of the internet connection is to serve CRM information such as contact information, past customer service history, customer service notes, voice phone calls and reports to the call center(s) receiving or initiating phone calls.
3. The PBX/CRM server includes a database for each call center using it, which consists of the information entered in to it by the call center manager, and the call center employees, during the course of or in preparation for their communication with third parties. The information entered in to the PBX/CRM server (contact list) must match the information templates required by the PBX/CRM server; for example, the template contains fields for “phone number”, “address”, “city”, “first name”, much like any phone book or contact list, as well as fields specifically related to the PBX/CRM server’s user’s industry, for example, for the Defendant this includes fields like “How Many TVs” amongst other similar examples. The information entered in to this contact list must further pass through our fingerprint mechanism described further in this document, in order for it to be available to be called, rather than quarantined or purged upon entry attempt.
4. In addition to the PBX/CRM server, there is networking equipment and cables in our data center, on the end of our telephone and third party service providers, and at Defendant’s office. Collectively, this networking equipment enables telephones and computers at Defendant’s office to connect to the PBX/CRM server, and for phone calls to reach the Publicly Switched Telephone Network (PSTN), so that the PSTN subscriber (the owner of a telephone number) can be connected to the call through the PBX equipment that exists at said subscriber’s telephone company.
5. The PBX/CRM server allows for additional features much like any local telephone company would provide additional features to residential landlines, through their PBX or feature servers. Common features exist like voicemail, hold

and conference rooms, however more specialized features exist in the equipment, and it is the specialized features that are called in to question when attempting to determine whether or not the PBX/CRM server is an ATDS (and therefore whether or not the defendant used an ATDS to make the phone calls referenced by the Call Detail Records).

11. All functionality of the equipment, other than standard computer functions such as powering it on (ie to provide electricity to it), running an operating system (which is unrelated to telephone technology) and telephone/internet networking (which is not included in the act of initiating and/or managing calls) is functionality that has been designed and developed by our company.
12. When designing our PBX/CRM server technology and functionality, our company's R&D team, including myself, remained blind to industry standards with the intent for our company to (a) avoid allegations of patent infringement, (b) provide and create unique perspective of functionality that would assist businesses in effectively and productively communicating with their customers and (c) create a broadly marketable product. As such, terms that we use in our marketing material, including our website, and when discussing features with customers, may differ from the commonly accepted definition of those features.
13. The "Autodial" feature is a software feature that runs in the CRM interface presented on each caller's computer rather than on the PBX/CRM server itself.
14. In the "Autodial" feature, the instruction to begin dialing phone numbers is initiated by the individual caller, who will be dialing the phone number directly, instructing the autodialer that they are "Ready", at which point it will automatically retrieve the next phone number to dial from the lead distribution system, and as long as the caller remains ready, will dial it from the caller's computer.
15. The "autodial" feature turns itself off once a call answers, as a cause of a call being answered; that the caller is no longer considered "Ready", or to be using the "autodial" feature.
16. Once the caller is no longer considered to be "Ready" or to be using the "autodial" feature, the caller must insert a log entry for their previous call, and instruct the "autodial" feature that they are ready to (want to) begin to use it again, which starts the process over.
17. Each caller hears ringing while the called destination is ringing, and that ringing is generated by the called destination, unless "premature media" (ringing from the intended recipient's carrier) is unavailable (such as for technical reasons), in which case the CRM/PBX server will generate ringing to the caller, using its' own ringtone. Any service messages, if available, are played to the caller.
18. The caller knows which phone number is being called, and the contact information for that phone number, as well as all other information provided under the database template for the person who is being called, however they do not select the phone number to call, that is instead assigned by their, or by their calendar.

19. The phone number that a caller dials, is assigned to their computer for them to dial, in this order of priority:

- a. If the caller has scheduled an appointment to a person who has requested to be called back, and the scheduled appointment is due, then the phone number that the autodial feature assigns to the caller's computer, to dial, is the primary phone number of the person that the appointment is scheduled with. Significantly over-due scheduled appointments do not get assigned through this method.
- b. If there are no due or overdue scheduled appointments as described above, then the phone number that the "autodial" feature assigns to the caller's computer, to dial, is a phone number provided by the "lead distribution engine"

20. Defendant has access to a feature available in our equipment that for marketing reasons, we occasionally call a "predictive dialer", which is instead a feature we call "Background dialer".

21. The word "Background" in "Background dialer" references that the call is in the background, and so rather than the caller hearing a ring, they instead hear silence (or rather, no tone or audio feedback is generated) while waiting for a called party to answer.

22. The "Background dialer" is a software feature that runs on the PBX/CRM server.

23. To begin "Background dialing", the caller must at all times:

- a. Be signed in to the CRM through their web browser, using the specific software we require (Google Chrome; forcing the use of this specific software allows us to avoid the potential for compatibility-related bugs)
- b. Have their phone connected and functional (to have their phone disconnect, would immediately cause the end of their background dialing session)
- c. Have a headset with an available microphone (to have the headset unplugged would cause their phone to disconnect, and therefore immediately cause the end of their background dialing session)
- d. Have *nothing else open* (to open a file on their computer, would cause them to immediately end their background dialing session)
- e. Be assigned to phone numbers to call through our lead distribution engine, that are instructed to be called via the background dialer, and that are directly assigned to that caller

24. A caller that is background dialing, after indicating that they are ready, must sit on a blank screen (the "dashboard"), which says "Background dialing", and then when a call is answered, the CRM file opens immediately, with the information entered in to the CRM with

the phone number, such as for Defendant, the “How Many TVs” field for the person who answered.

25. The phone numbers that are called for each caller using the background dialer feature, are phone numbers provided by the “lead distribution engine” (described later, notably incapable of either generating or storing phone numbers that were generated using a sequential or random number generator)
26. The default time-out period for the background dialer is set at 24 seconds from the time that ringing on the remote end began. If a phone call is still ringing after 24 seconds, it is ended and replaced with another phone number for the same caller, provided by the “lead distribution engine”. This time-out period can be changed between 22 and 30 seconds, depending on if the manager of the caller desires to receive more or less voicemails (a longer ring duration causes the callers to receive more voicemails).
27. The “Background dialer” feature contains the ability to initiate multiple calls per available caller, but is not able to initiate calls when no callers are available.
28. The amount of calls per available caller is set based on the number of callers available that are assigned to the exact same set of phone numbers by their manager. For example, our default for this setting on a new system is to call one call at a time, when only one caller is available, then to call four calls at a time when at least two callers are available (two per caller). The purpose of setting an amount of calls-per-available-agent, that is additionally based on the number of callers available (the difference is between indicating “always call 3 calls per caller(agent)” as most systems do, versus “if 1 caller is available, call 1, if 2 are available, call 4) is in this method’s ability to dramatically lower the chances of abandoned calls.
29. The amount of available callers for the purpose of determining how many calls should be dialed at one time is defined as the available callers that have a working phone connection, that are currently background dialing (described above in 23-24) who are also assigned to call the same set of phone numbers, so that in the case of dialing four calls for two callers (two calls per caller), none of the four calls are solely attributed to one particular caller, and also to allow for a new third caller who begins background dialing, to receive a call that had already began to be dialed for the initial two callers.
30. When multiple calls are being dialed per available caller, a call may be answered while other calls are still dialing, resulting in calls remaining, that are still ringing (remaining calls)
31. If there are remaining calls when a caller receives a call that was answered, those remaining calls, while still ringing, are transferred to another available caller who is a caller that is assigned to the same set of phone numbers, and who is actively engaged in a session of background dialing (which is to say that the preconditions listed above in 23, apply to the receiving caller)
32. The background dialer may optionally employ answering machine detection technology, which if used will cause an answered call to not be considered as answered, until 9/10ths of a second after the greeting of a called party has ended

33. When using answering machine detection technology, if a called party picks up and does not say anything, such as if they wait to see what the caller is going to say, the called party will be detected as an answering machine, and will not be passed to the caller that is waiting for a call. The called party would reasonably reference this a “Dead air call” (inaccurate detection would be caused by the called party not answering a call as one normally would, i.e., to not answer with a greeting as a reasonable person would)
34. Abandoned calls are presented and tracked the same as one would expect an abandoned call to be presented and tracked in the case of a predictive dialer, for the purposes of the Telemarketing Sales Rule (TSR) as we believe that any technology that is capable of producing abandoned calls should be treated the same as any other technology that is capable of producing abandoned calls, for the purposes of the abandoned call restrictions and safe harbors.
35. There are no methods of instructing the PBX/CRM server to initiate calls after a call has been indeterminate, other than through the already described “Autodial” and “Background dial” features. The PBX/CRM server also does not have the capability to integrate with third-party systems in a way that could result in an additional method of dialing phone numbers.
36. The “Lead Distribution Engine” uses a database of phone numbers that are associated with additional, related data (customer information), for example the customer information, for the defendant, includes “First Name”, “Last Name”, “How Many TVs”, “Favorite Channels”, and other similar fields, and with that database of phone numbers, it selects an available phone number that is assigned to the caller that will be provided the phone number, or who would call the phone number, and provides it to the system that has requested that phone number (the lead distribution method, for example, to the “Autodial” or “background dial” features)
37. The Lead Distribution Engine only provides phone numbers to lead distribution methods, and all lead distribution methods require that a caller clicks an element with-in the interface, though the lead distribution methods may initiate a call automatically after that button is pressed, once a phone number is returned by the lead distribution engine.
38. The database of phone numbers referenced in the description of the Lead Distribution Engine, is one that is filled using the “Lead upload” feature.
39. With the “Lead upload” feature, a CSV (Comma Separated Value) file is uploaded by a manager of the call center that’s using the PBX/CRM server, followed by the manager being provided with field mappings from the CSV field names, to the CRM field names (for example, they may say that “Name” on the CSV file is equal to “First name” in the CRM).
40. Before a lead is placed in to the lead database by the lead upload feature, all records in the file that were being uploaded by the manager, are analyzed and in a manner that produces a “Fingerprint” and “Score” of the lead file; if a lead file does not achieve a sufficiently high score, all leads in the file are rejected. The scoring criteria is intended to ensure that the manager did not unintentionally upload a file that was produced by a number generator, rather than from valid lead sources.

C. All Documents Produced

41. I am the custodian of the business records discussed in this affidavit.
42. The records produced to Finders Keepers and to Plaintiffs' counsel were based on electronic records maintained in good faith and in the ordinary course of business when the acts, conditions, or events reflected in those records were recorded.

Sworn as true to the best of my knowledge and belief, subject to the penalties of perjury.



Signature



Date